Supreme Court, U.S.
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96 650 OCT 22 1996
No. 96-
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

INTERCARGO INSURANCE COMPANY f/k/a
INTERNATIONAL CARGO & SURETY CO.
(SURETY FOR M. GENAUER),
Petitioner,

vs.

THE UNITED STATES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: October 22, 1996

77 pp

QUESTIONS PRESENTED

The decision of the panel majority of the Federal Circuit decided important questions of federal law which have not been, but should be, settled by this Court:

1. Whether the decision of the panel majority is directly contrary to the intent of Congress and eviscerates 19 U.S.C. § 1504?

2. Whether the principles of harmless error apply in this case?

PARTIES TO THE PROCEEDINGS

Petitioner, Intercargo Insurance Company, was the appellee below on the issues presented for review.

Respondent, The United States, was the appellant below on the issues presented for review.

Petitioner, Intercargo Insurance Company, formerly known as International Cargo & Surety Insurance Co., acted as surety for the importer of record, M. Genauer. Intercargo Insurance Company is a wholly owned subsidiary of Intercargo Corporation.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Intercargo Insurance Company respectfully requests that a writ of certiorari issue to review the judgment (A17)[1] and decision (A1-16) of the United States Court of Appeals for the Federal Circuit, entered May 2, 1996.

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1. Reference to page numbers of the Appendix are preceded by "A", followed by the page numbers.

OPINIONS BELOW

The opinion (A1-16) of the United States Court of Appeals for the Federal Circuit is reported as *Intercargo Ins. Co. v. United States*, 83 F.3d 391 (Fed. Cir. 1996), *reh'g denied, in banc suggestion declined,* 1996 U.S. App. LEXIS 19185 (July 25, 1996). The opinion (A20-26) of the United States Court of International Trade (Slip. Op. 95-37) is reported as *Intercargo Ins. Co. v. United States*, 879 F. Supp. 1338 (Ct. Int'l Trade 1995), *rev'd,* 83 F.3d 391 (Fed. Cir. 1996).

JURISDICTION

The majority opinion (A1-14), dissenting opinion (A15-16) and judgment (A17) of the United States Court of Appeals for the Federal Circuit were entered on May 2, 1996. On July 25, 1996, the Federal Circuit denied Petitioner's Combined Petition for Rehearing with Suggestion for Rehearing In Banc. The jurisdiction of this Court is conferred by 28 U.S.C. Section 1254(1) (1996).

STATUTES AND REGULATIONS INVOLVED

19 U.S.C. Section 1504 provides in relevant part:

§ 1504. Limitation on liquidation

(a) Liquidation

Except as provided in subsection (b) of this section, an entry of merchandise not liquidated within one year from:

(1) the date of entry of such merchandise . . .

shall be deemed liquidated at the rate of duty, value, quantity and amount of duties asserted at the time of entry by the importer of record. Notwithstanding section 1500(e) of this title, notice of liquidation need not be given of an entry deemed liquidated.

(b) Extension

The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer of record in such form and manner as the Secretary shall prescribe in regulations, if -

(1) information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer . . . .

19 U.S.C. § 1504 (1988), amended by Act of Dec. 8, 1993, Pub. L. No. 103-182, title VI, § 641, 107 Stat. 2204 (1993).

Section 159.12 of the Customs Regulations, 19 C.F.R. Section 159.12, provides in relevant part:

§ 159.12 Extension of time for liquidation.

(a) *Reasons* -- (1) *Extension.* The district director may extend the 1-year statutory period for liquidation for an additional period not to exceed 1 year if:

(i) *Information needed by Customs.* Information needed by Customs for the proper appraisement or classification of the merchandise is not available . . . .

(b) *Notice of extension.* If the district director extends the time for liquidation, as provided in paragraph (a)(1) of this section, he promptly shall notify the importer or the consignee and his agent and surety on Customs Form 4333-A, appropriately modified, that the time has been extended and the reasons for doing so.

19 C.F.R. § 159.12 (1990).[2]

STATEMENT OF THE CASE

Under the *Customs Procedural Reform and Simplification Act of 1978* (Pub. L. No. 95-410, Title II, § 209(a), 92 Stat. 902 (1978)), Congress amended the Tariff Act of 1930 by adding a new Section 504 (19 U.S.C. § 1504), which effectively constituted a statute of limitations governing the liquidation of entries of merchandise. Subsection (a) of Section 504 provided, *inter alia*, that an entry not liquidated within one year from the date of entry would be deemed liquidated at the "rate of duty, value, quantity, and amount of duties asserted at the time of entry" by the importer of record. 19 U.S.C. § 1504(a) (1978).

---

2. Pursuant to Supreme Court Rule 14(1)(f), the full texts of 19 U.S.C. Section 1504 and 19 C.F.R. Section 159.12 appear at A29-31 and A31-33, respectively.

Subsection (b) of Section 504 permitted the Secretary of the Treasury ("Secretary") to extend the liquidation period "by giving notice of such extension to . . . the importer of record . . . in such form and manner as the Secretary shall prescribe in regulations." 19 U.S.C. § 1504(b) (1978) (emphasis added). The statute authorized extensions "only" for the reasons stated in the statute (Pub. L. No. 95-410, H.R. Rep. No. 621, 95th Cong., 1st Sess. 25 (1978)), including, "if-- information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer." 19 U.S.C. § 1504(b)(1) (1978) (emphasis added).

To implement this congressional mandate, the Secretary issued Treasury Decision 79-221 (44 Fed. Reg. 46829, August 9, 1979), which stated in pertinent part:

§ 159.12 Extension of time for liquidation

(a) Reasons -- (1) Extension. The district director may extend the 1-year statutory period for liquidation for an additional period not to exceed 1 year if:

(i) Information needed by Customs. Information needed by Customs, for the proper appraisement or classification of the merchandise is not available . . . .

(b) Notice of extension. If the district director extends the time for liquidation, as provided in paragraph (a)(1) of this section, he promptly shall notify the importer or the consignee and his agent and

surety on Customs Form 4333-A, appropriately modified, that the time has been extended **and the reasons for doing so.**

19 C.F.R. § 159.12 (1979) (emphasis added).

Subsequent to the promulgation of Section 159.12 in 1979, Customs began issuing Extension Notices under Section 1504(b)(1) and Sections 159.12(a)(1) and (b) which stated:

Notice of Extension

The liquidation of this entry has been extended, additional time is required by customs to obtain information necessary to process this transaction.

In 1985, Customs inexplicably changed the language of the (b)(1) Notice to read:

Notice of Extension

THIS IS A COURTESY NOTICE.

THE LIQUIDATION OF THIS ENTRY HAS BEEN EXTENDED: ADDITIONAL TIME IS REQUIRED BY CUSTOMS TO PROCESS THIS TRANSACTION. NO ACTION IS NECESSARY ON YOUR PART UNLESS INFORMATION IS SPECIFICALLY REQUESTED BY CUSTOMS.

See A21.

In the trial court, Petitioner, Intercargo Insurance Company ("Intercargo"), presented a Customs Performance Report for Fiscal Year 1990 to establish that Customs may

have changed the Notice due to a significant increase in the transactions it was required to process and a simultaneous reduction of its staff. Customs has been unable to determine or explain why the foregoing language change occurred.

Intercargo acted as the surety for the importer of record, M. Genauer ("Genauer"), on eight entries of merchandise ("Subject Entries") which Genauer filed between September 19, 1989 and November 1, 1989 at the Port of Seattle, Washington. On or about July 21, 1990, and within one year of the date of each respective entry, Customs issued individual Extension Notices to Genauer and Intercargo, purportedly under the authority of Section 1504(b)(1). Each Notice contained the post-1985 language indicated above.

On July 12, 1991, more than one year after the respective dates of entry, Customs liquidated the entries with an increase in duty to reflect certain quota charges which Genauer claimed were not dutiable. Intercargo timely filed a protest contesting the validity of both the extensions and the liquidations. *See* 19 U.S.C. § 1514. Following the denial of its protest, Intercargo paid the contested duties and on August 31, 1992, timely commenced this action by filing a summons in the Court of International Trade ("CIT"). *See* 28 U.S.C. § 2632(b).

On December 8, 1992, Intercargo filed a two-count Complaint challenging the denial of its protest. Count I challenged Customs' discretionary decision to extend the liquidation of the Subject Entries; Count II challenged the validity of the Notices employed by Customs to extend the

liquidations. Jurisdiction of the CIT was based upon 28 U.S.C. Section 1581(a) (1992).

On February 3, 1994, the trial court entered an order permitting Intercargo to voluntarily abandon Count I. The parties' arguments regarding Count II were subsequently submitted for ruling on cross-motions for summary judgment. At the conclusion of the oral argument on February 23, 1995, the trial court ruled from the bench in favor of Intercargo. On March 9, 1995, the trial court issued its opinion and entered judgment in favor of Intercargo and against the United States. *Intercargo Ins. Co. v. United States*, 879 F. Supp. 1338 (Ct. Int'l Trade 1995); A20-28.

The trial court accurately identified the relevant issue, the controlling precedent, and the necessary result:

> Thus, the issue that came before this Court was whether the notice issued to Intercargo complied with 19 U.S.C. § 1504 and 19 C.F.R. § 159.12, and validly extended the liquidation period when the notice did not explicitly contain one of the three statutory reasons set forth in 19 U.S.C. § 1504(b). The Court of Appeals for the Federal Circuit ("CAFC"), has spoken clearly on the subject of notices of extension in *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763 (Fed. Cir. 1993). In that case, the CAFC interpreted 19 U.S.C. 1504 *de novo* in reviewing a Court of International Trade decision that Customs had not lawfully extended the liquidation period for contested entries. The CAFC ruled that "[t]he time period may be extended . . . provided that Customs

> notifies the importer of the extension and articulates one of the three statutory reasons for the extension. 19 U.S.C. § 1504(b), (c)." *Id.*, 6 F.3d at 767.
>
> This Court found that the reason given to Intercargo in the present case, that "ADDITIONAL TIME IS REQUIRED . . .," was not a clearly articulated statutory reason for extending liquidation. This Court therefore held the extension not to be valid under the law. Accordingly, plaintiff's motion for summary judgment was granted, and defendant's motion for summary judgment was denied.

A25-26.

The government timely filed an appeal to the United States Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. Section 1295(5), and the majority opinion of the Federal Circuit reversed the CIT. *Intercargo Ins. Co. v. United States*, 83 F.3d 391 (Fed. Cir. 1996); A1-14. The panel majority began its analysis with the Federal Circuit's prior decision in *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763 (Fed. Cir. 1993):

> The *St. Paul* court held that under section 1504 the Customs Service had one year within which to liquidate entries unless "properly noticed extensions" were granted "for statutory reasons." 6 F.3d at 770. The applicable regulation, according to the court, required "that Customs notify the importer of the extension and articulate[] one of three statutory reasons for the extension." 6 F.3d at 767.

A5. The panel majority then accurately summarized Intercargo's position:

> Intercargo's argument in this case is based on *St. Paul* and is straightforward. The argument proceeds as follows: (1) *St. Paul* requires that Customs' extension notices articulate one of the three statutory reasons for the extensions; (2) the only applicable statutory ground for obtaining extensions in this case is that "information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer"; (3) the notices in this case did not articulate that statutory ground, but merely stated that Customs needed "additional time" to process the transaction; therefore (4) the extension notices were invalid; and (5) each entry was liquidated by operation of law one year after the date of entry of that merchandise, at the duty rate claimed by Genauer at the time of entry.

A5-6.

Rejecting the government's argument that the Extension Notices here articulated a proper statutory reason and met the "requirement" of *St. Paul*, the panel majority also stated:

> While it is true that the notices advised Intercargo that the time had been extended and gave a reason for the extensions, the reason given was not one of the statutorily authorized reasons. The statutory reason that Customs intended to invoke was that "information needed for the appraisement or classification of the

> merchandise is not available to the appropriate customs officer." 19 U.S.C. § 1504(b)(1) (1988). The notices, however, made no reference to the need for information. We thus agree with Intercargo that the reason given in the extension notices was not one of the reasons set forth in the statute, and that the notices therefore did not satisfy the requirement of the regulation as interpreted by the *St. Paul* court.

A6. Finding that the above "conclusion, however, does not decide this case," the panel majority then applied "the principles of harmless error" in deciding that the government's violation of the *St. Paul* requirement was a mere "procedural error" or "technical defect", and that Intercargo was not prejudiced by Customs' failure to comply with the clear requirement of Section 1504 and Section 159.12. A7-13.

The dissenting opinion by Circuit Judge Rader relied upon both the *St. Paul* decision and the clear intent of Congress in enacting Section 1504:

> This court's decision in *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763 (Fed. Cir. 1993), governs this dispute over whether the United States Customs Service (Customs) obtained a valid extension of time for liquidation of Intercargo's entries.
>
> In *St. Paul*, this court held that section 1504 gives Customs one year to liquidate entries unless "properly noticed extensions" were granted "for statutory

reasons." *Id.* at 770. This court stated that Customs must "notify the importer of the extension and articulate[] one of three statutory reasons for the extension." *Id.* at 767. In this case, as this court notes, Customs did not give proper notice. . . .

Section 1504 was passed, in part, to "increase certainty in the process for importers, surety companies and other third parties with a potential liability relating to a customs transaction." S. Rep. No. 778, 95th Cong., 2d Sess. 32 (1978), *reprinted in,* 1978 U.S.C.C.A.N. 2211, 2243. Under the prior law, importers learned years after goods had been imported and sold that additional du[ti]es [sic] were due, or an excess of duties had been paid pending liquidation. *Id.* The 1978 enactment changed the law to address these lengthy and prejudicial delays to importers.

Thus, the Customs' extension notices were improper because they did not give a statutory reason for the extension. These notices did not satisfy the requirement of the regulation as interpreted in *St. Paul.* I would thus affirm the Court of International Trade's holding that the Customs' extension notices were defective.

A15-16.

ARGUMENT

I. The Decision Of The Panel Majority Is Directly Contrary To The Intent Of Congress And Eviscerates Section 1504

In *Chevron U.S.A. Ins. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), this Court declared:

> If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress.

In enacting the *Customs Procedural Reform and Simplification Act of 1978*, Pub. L. No. 95-410, Title II, § 209(a), 92 Stat. 902, Congress amended the Tariff Act of 1930 by adding a new Section 504 (19 U.S.C. § 1504) ("**Limitation on liquidation**"). Subsection (a) of Section 504 provides, *inter alia*, that an entry not liquidated within one year from the date of entry "shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry." 19 U.S.C. § 1504(a). Subsection (b) of Section 504 states:

> **(b) . Extension** – The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer of record in such form and manner as the Secretary shall prescribe in regulations, if-
>
> (1) information needed for the proper appraisement or classification of the

> merchandise is not available to the appropriate customs officer;
>
> (2) liquidation is suspended as required by statute or court order; or
>
> (3) the importer, consignee, or his agent requests such extension and shows good cause therefor.

19 U.S.C. § 1504(b) (emphasis added); A29-30. Since 19 U.S.C. Section 1504 authorizes extensions **"only"** for the reasons stated therein (H.R. Rep. No. 621, 95th Cong., 1st Sess. 25 (1978)), the *St. Paul* court correctly held as a matter of law that the notice must articulate "one of the three statutory reasons for the extension." 6 F.3d at 767. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9.

The Secretary implemented Section 1504's directive to prescribe the "form and manner" of the Notice by promulgating 19 C.F.R. Section 159.12. The plain meaning of the Secretary's words govern unless there is a clearly expressed contrary legislative intent (*see Immigration & Naturalization Serv. v. Stanisic*, 395 U.S. 62, 72 (1969)), and the Secretary is not free to interpret his own regulation so as to nullify its effective intent or wording. *See Bahramizadeh v. Immigration and Naturalization Serv.*, 717 F.2d 1170, 1173 (7th Cir. 1983).

This Court should give due deference to the express language of Section 159.12 because it follows Congress' clear intent and is a substantive rule which effectuates a substantial right granted by Section 1504(a), *i.e.*, the right to have an entry "deemed liquidated". As such, it has the force and effect of law. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979). This conclusion is even more compelling because when Section 1504 was amended five years after the promulgation of Section 159.12, Congress failed to overrule that portion of the regulation requiring that Notices of Extension state a statutory reason for the extension. Pub. L. No. 98-573, § 191(d), 98 Stat. 2948 (1984). Congress is presumed to be aware of the Secretary's regulations, *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979), particularly where, as here, the regulation was brought to public attention through the rule-making process, including Federal Register publication. *See United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979). *See also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.") When Congress amended Section 1504 in 1984, it ratified the requirement that a statutory reason be stated in the Extension Notice as a valid exercise of the Secretary's delegated authority under Section 1504(b). *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975). *See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 n.66 (1982).

According to the plain language of Section 1504 (*i.e.* "by"), the Notice is more than a mere warning or a ministerial notification of a completed administrative decision -- **it is the act of extension itself!** Unlike all other notices

issued by Customs, a Notice of Extension does not condition or require the exercise of a substantive right; rather, it postpones and in most cases extinguishes a party's substantive right to have an entry "deemed liquidated" under Section 1504(a). *Compare* 19 C.F.R. § 174.30 (1995) (notice of denial of a protest); 19 C.F.R. § 172.1 (1995) (notice of liquidated damages).

Using the ordinary, contemporary meaning of the words employed by Congress, the plain meaning of Section 1504, as implemented by Section 159.12, is that Customs can extend the liquidation of an entry only by issuing a Notice which articulates a statutory reason for that extension. A Notice which does not articulate a statutory reason does not satisfy the necessary prerequisites specified by Congress and the Secretary, and any affected entries are "deemed liquidated" by operation of law. *See* 19 U.S.C. § 1504(a); A29. As this Court has noted:

> [I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.

Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980).

After conceding that the Notices here did not articulate one of the reasons set forth in Section 1504 and "did not satisfy the **requirement** of the regulation [19 C.F.R. § 159.12] as interpreted by the *St. Paul* court," the panel majority concluded that this substantive violation was a mere "technical defect". A6, 13 (emphasis added). This

conclusion eviscerates Section 1504 and sanctions conduct by Customs directly contrary to its own regulation, Section 159.12. Thus, Customs is no longer required to articulate one of the three statutory reasons for extension contained in Section 1504(b). This result is contrary to the clear intent of Congress in enacting Section 1504:

> The provisions adopted by the committee would **increase certainty** in the customs process for importers, surety companies, and other third parties with a potential liability relating to a customs transaction. Under the present law, an importer may learn years after the goods have been imported and sold that additional duties are due, or may have deposited more money for estimated duties than are actually due but be unable to recover the excess for years as he awaits liquidation. Surety companies, which are jointly liable for additional duties, would be better able to **control** their **liabilities**. Sureties would also be better protected against losses resulting from dissolution of their principals in instances where there has been **undue delay**.

S. Rep. No. 778, 95th Cong., 2d Sess. 31 (1978), *reprinted in,* 1978 U.S.C.C.A.N. 2211, 2242-43 (emphasis added). *See also* H.R. Rep. No. 621, 95th Cong., 1st Sess. 25 (1978). As Circuit Judge Rader correctly noted in his dissent:

> Section 1504 was passed, in part, to "increase certainty in the [customs] [sic] process for importers, surety companies, and other third parties with a potential liability relating to a customs transaction

. . . ." Under the prior law, importers learned years after goods had been imported and sold that additional du[ti]es [sic] were due, or an excess of duties had been paid pending liquidation. . . . The 1978 enactment changed the law to address these lengthy and prejudicial delays to importers.

A16. *See also Morton v. Ruiz*, 415 U.S. 199, 232 (1974) (agency procedures must "conform to the law" and be "consistent with the governing legislation").

II. The Principles Of Harmless Error Do Not Apply In This Case

The panel majority misapprehended or overlooked both the law and the facts in concluding that *St. Paul* was not dispositive and that the principles of harmless error must be applied to this "procedural error". A12-13. This Court should exercise its supervisory power to correct this misapplication of the harmless error principles by the Federal Circuit. *See* S. Ct. R. 10(a).

A. Section 1504 Specifies The Consequences Of Noncompliance

Apparently focusing only on subsection (b) of Section 1504, the panel majority erroneously held: (1) that the "requirement" of *St. Paul* "does not decide this case"; (2) that "[t]here remains the question of what consequence should flow from the defect in the notices"; and (3) "that neither the statute nor the regulation dictates that the necessary

consequence of a defect in the extension notice is to render the extension void." A6, 8.

The principles of harmless error do not apply in cases where Congress has specified the consequences of noncompliance. *See School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981). 19 U.S.C. Section 1504(a) clearly specifies the consequences for a failure by Customs to articulate one of the three reasons for extension enumerated in 19 U.S.C. Section 1504(b):

> **(a) Liquidation.** Except as provided in subsection (b) of this section an entry of merchandise not liquidated within one year from:
>
> (1) the date of entry of such merchandise . . .
>
> **shall be deemed liquidated** at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer of record. . . .

19 U.S.C. § 1504(a) (emphasis added); A29-31. Applying the "requirement" of *St. Paul*, the trial court (and the dissent) correctly concluded that the purported extensions were "not . . . valid under the law [Section 1504(b)]" and that the Subject Entries were deemed liquidated at the time of entry under Section 1504(a). A16, 26. The opinions relied upon by the panel majority in applying its harmless error analysis are distinguishable because each case clearly held that the relevant statute did not specify the consequences for noncompliance. *See, e.g., Brook v. Pierce County*, 476 U.S. 253, 259 (1986); *United States v. James Daniel Good Real*

Property, 114 S. Ct. 492, 506 (1993); *Kemira Fibres Oy v. United States*, 61 F.3d 866, 871-72 (Fed. Cir. 1995); *Diaz v. Department of the Air Force*, 63 F.3d 1107, 1109 (Fed. Cir. 1995); *Sea-Land Serv., Inc. v. United States*, 735 F. Supp. 1059, 1063 (Ct. Int'l Trade 1990), *aff'd*, 923 F.2d 838 (Fed. Cir. 1991). A7, 10-13.

B. Any Action By Customs Contrary To Its Own Regulation Is Illegal And Has No Effect

Agency regulations have "the force and effect of law." *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265 (1954). Since it is undisputed that Customs did not articulate one of the three reasons specified by its own regulation, the Extension Notices here were simply invalid. The Third Circuit, relying upon this Court's decisions, has declared:

> It is a well established proposition that an agency is bound by its regulations. *United States v. Nixon*, 418 U.S. 683, 695-96 . . . (1974), *Vitarelli v. Seaton*, 359 U.S. 535, 539 . . . (1959); *Service v. Dulles*, 354 U.S. 363, 372-73 . . . (1957) . . . . Failure to comply with regulations is a fatal flaw to the administrative action . . . . *An action undertaken by an agency contrary to its regulations is illegal and of no effect. Vitarelli v. Seaton*, 359 U.S. at 545 . . .; *accord, Accardi v. Shaughnessy*, 347 U.S. 260, 268 . . . (1954). Since the Board did not comply with its regulations . . ., it is to be given no effect . . . .

> To permit the agency to do it over again, this time correctly, gives the agency no incentive to comply at the start . . . . Failure to comply with its regulations renders the agency's act null.

Kelly v. Railroad Retirement Bd., 625 F.2d 486, 491-92 (3d Cir. 1980) (emphasis added). Again relying on this Court's decisions, the Third Circuit later held as follows in a closely analogous case:

> The ALJ's conclusion that the 120-day period was "advisory" is puzzling. The language of the regulation offers no support for that appraisal. Moreover, the statutory language shows that Congress was concerned with delay and wanted the Secretary to promptly resolve complaints. A regulation that failed to comply with that directive would lack validity. *See International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551 . . . (1978) . . . .
>
> Whether Lehigh had suffered prejudice from the delay is not relevant. Agencies must observe not only time limits prescribed by Congress, but also their own procedural regulations. *See United States v. Nixon*, 418 U.S. 683, 695-96 . . . (1974) . . . . As the Supreme Court said in *Mohasco v. Silver*, 447 U.S. 807, 826 . . . (1980), "Strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." This teaching of *Mohasco* loses none of its force when the agency itself imposes the procedural limitations.

> Since the Secretary failed to follow the requirements specified by Congress or even his own regulation, it follows that the order may not be enforced.

Lehigh Valley Manpower Program v. Donovan, 718 F.2d 99, 102 (3d Cir. 1983); *accord*, *Frisby v. United States Dept. of Housing & Urban Dev.*, 755 F.2d 1052, 1055-56 (3d Cir. 1985); *Smith v. Resor*, 406 F.2d 141, 145-46 (2d Cir. 1969). In this case, it is equally clear that Congress was concerned with delay by Customs and uncertainty in the importing community when it enacted Section 1504, and Section 159.12 was promulgated by the Secretary to resolve those concerns. Since Customs failed to follow its own regulation, the purported Extension Notices were null and void. *See Athas v. United States*, 597 F.2d 722, 726 (Ct. Cl. 1979) ("*void ab initio*"); *United States v. Jones*, 368 F.2d 795, 799 (2d Cir. 1966).

C. Section 1504 Is A Jurisdictional Bar Or Statute Of Limitations Whose Requirements Are Mandatory

1. Section 1504 Is A Jurisdictional Bar

In *Brook v. Pierce County*, 476 U.S. 253, 262 (1986), a decision relied upon by the panel majority (A10), this Court distinguished cases where "courts should read a [statutory] command . . . as a statute of limitations or jurisdictional bar." The principles of harmless error do not apply where "the statutory language and legislative history" indicate that "Congress intended to impose a jurisdictional limitation on

agency action." *Id.* at 258, 262-63; *cf. Service v. Dulles*, 354 U.S. 363.

"[W]here a statute both requires the agency to act within a certain time period and specifies a consequence if that requirement is not met, the agency will lose jurisdiction to act." *Friends of the Crystal River v. United States Envtl. Protection Agency*, 35 F.3d 1073, 1080 (6th Cir. 1994). 19 U.S.C. Section 1504 (**Limitation on liquidation**): (1) provides that Customs "may extend the period in which to liquidate an entry by giving notice" and articulating one of the three statutory reasons [Section 1504(b)]; and (2) specifies that if Customs does not give the required notice, an entry "shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry." A29. Based upon its clear language and plain meaning, Section 1504 is a jurisdictional bar, and "the term 'jurisdictional' refers to a statutory requirement that, if not complied with by the agency, would deprive the agency of all power to act on the matter." *Milwaukee County v. Donovan*, 771 F.2d 983, 986 n.2 (7th Cir. 1985); *accord, City of Edmonds v. United States Dept. of Labor*, 749 F.2d 1419, 1422 (9th Cir. 1984) (section at issue is "jurisdictional" and Congress intended to preclude any action if the Secretary failed to comply with it); *School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981) (if "jurisdictional", noncompliance with a statutory requirement "is an absolute bar to administrative action"). This Court has frequently held that similar statutory requirements are jurisdictional. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *McDonnell Douglass Corp. v. Green*, 411 U.S. 792, 798 (1973). The reliance of the panel

majority on *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), is misplaced, since in *Torres* this Court held that failure to specify a party as an appellant was a jurisdictional bar under Rule 3(c) of the Federal Rules of Appellate Procedure.

The argument for raising a jurisdictional bar in this case is strengthened by the fact that Section 1504 specifies the consequences for noncompliance. *Cf. Milwaukee County*, 771 F.2d at 988. However, a statute or regulation can still be jurisdictional even if it fails to specify the consequences for noncompliance. *See City of Edmonds*, 749 F.2d at 1422; *See generally Mohasco Corp. v. Silver*, 447 U.S. 807.

2. Section 1504 Is A Statute Of Limitations

Even if Section 1504 is not a jurisdictional bar which absolutely deprived Customs of all power to act upon the Subject Entries, the legislative history of Section 1504 establishes beyond question that Congress intended it to be a statute of limitations. As the Senate Committee Report on the *Customs Procedural Reform and Simplification Act of 1978* noted: "There is no present law requiring liquidation to be completed within a **specific time period.**" S. Rep. No. 778, 95th Cong. 2d Sess. 31 (1978), *reprinted in*, 1978 U.S.C.C.A.N. 2242 (emphasis added). The House Committee Report likewise stated: "Section 210 would amend the Tariff Act of 1930 by adding a new section 504 which would **place a limit on the time** in which the Customs Service has to liquidate an entry." H.R. Rep. No. 621, 95th Cong. 1st Sess. 24 (1978) (emphasis added).

Finally, the inclusion in Senate Report No. 778 of references to "increase[d] certainty", control of liabilities and the prevention of "undue delay" establish beyond peradventure that Congress intended Section 1504 to be "a limitations statute". *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 (1982).

In *Delaware State College v. Ricks*, this Court reiterated the importance of statutes of limitations:

> It should not be forgotten that time-limitations provisions themselves promote important interests; "the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."

449 U.S. 250, 259-60 (1980), *quoting*, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975); *see also Mohasco Corp.*, 447 U.S. 807.

The trend in this Court's decisions away from a "jurisdictional" label and toward a "limitations" label has been discussed at length. *See, e.g., Zipes*, 455 U.S. at 395 n.12; *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 588-89 (5th Cir. 1981). The principal distinction is that a "jurisdictional" requirement is an absolute bar, while a statute of limitations is subject to waiver, estoppel and tolling. *See Zipes*, 455 U.S. at 392-98. In this case, that distinction does not make a difference, since the principles of harmless error do not apply to either a jurisdictional bar or a statute of

limitations (*see Brooks v. Pierce County*, 476 U.S. at 262-63), and Congress clearly intended Section 1504 to be either a jurisdictional bar or a statute of limitations. Moreover, this Court has strictly enforced Congress' intent regarding such "time limitations" and the avoidance of "stale or dormant claims." *See, e.g., Mohasco Corp.*, 447 U.S. at 818-26. Thus, the Third Circuit stated as follows in *School District of the City of Allentown*, 657 F.2d at 20:

> We may not ignore the legislative intent to grant the defendant a period of repose after the limitations period has expired.
>
> Specifically, the Secretary erred in making lack of prejudice . . . a determining factor in permitting a late filing. Any limitation period is arbitrary in nature. The choice of appropriate time is not entrusted to the administrative agency or to the courts. It is the result of legislative determinations made after weighing the various interests at stake . . . . Obviously, Congress intended that complaints be made and resolved within a very short time after the alleged violation occurred. It is not for us or the Secretary to casually ignore the statutory limitation.

In finding that the requirement of Section 1504 was a mere "procedural error" which did not prejudice Intercargo, the panel majority jejunely and impermissibly ignored the clear limitation intended by Congress.

3. Section 1504 Is Mandatory

Instead of applying "jurisdictional bar" or "statute of limitations" labels, several United States courts of appeal have described this Court's decisions as holding that a statutory or regulatory requirement was "mandatory".

For example, in *City of Edmonds v. United States Dept. of Labor*, 749 F.2d 1419 (9th Cir. 1984), the Ninth Circuit equated the term "mandatory" with the term "jurisdictional" and relied upon this Court's "mandatory" holding in *Mohasco Corp.* to reverse administrative action not in compliance with the relevant statute. 749 F.2d at 1421-23. *See also Pierce County v. United States*, 759 F.2d 1398, 1402 (9th Cir. 1985); *Milwaukee County v. Donovan*, 771 F.2d 983 (7th Cir. 1985).

Once again, the terminology used does not result in a different conclusion. Irrespective of whether Section 1504 is categorized as a "jurisdictional bar", a "statute of limitations" or "mandatory", noncomplying administrative action is null and void and should be reversed.

D. The Principles Of Harmless Error Do Not Apply And The Issue Of Prejudice Is Irrelevant

As this Court warned in *Chapman v. California*, 386 U.S. 18, 22 (1967): "[W]e must recognize that harmless-error rules can work very unfair and mischievous results . . . ."

Contrary to the belabored analysis of the panel majority in this case, all of the above decisions hold that the principles of

harmless error do not apply and that the issue of prejudice is simply irrelevant. As Judge Rader noted in his dissent, the panel majority "inaccurately analogizes Customs' defective notices to procedural errors in notices of appeal." A16. There is simply no relationship between Customs' failure to comply with Section 1504 and Section 159.12 and the analogy chosen by the panel majority--a *pro se* inmate mistakenly filing an informal brief instead of the notice of appeal required by Rule 3 of the Federal Rules of Appellate Procedure. In *Love v. Pullman*, 404 U.S. 522, 527 (1972), this Court observed that "[s]uch technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Quoted in, General Adjustment Bureau, Inc.*, 640 F.2d at 587; *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 475 (D.C. Cir. 1976). Likewise, any inquiry regarding prejudice is simply irrelevant:

> This prejudice to defendant, or lack of it, is simply irrelevant when Congress has drawn a line at the point where it believed claims should be barred.

School Dist. of the City of Allentown, 657 F.2d at 20; *accord, Lehigh Valley*, 718 F.2d at 102 ("Whether Lehigh suffered prejudice from the delay is not relevant").

In this case, the panel majority rejected Intercargo's claim of prejudice (that it would be required to pay additional customs duty) by observing that "[a] party is not 'prejudiced' by a technical defect simply because that party will lose its case if the defect is disregarded." A13. The majority then went on to observe that "[p]rejudice, as used in this setting,

means injury to an interest that the statute, regulation, or rule in question was designed to protect." *Id.*

Intercargo respectfully submits that any subsequent conduct by Customs which is inconsistent with liquidation by operation of law is *per se* prejudicial, since it requires a surety or importer to pay Customs a sum of money which, under the law, it should not have to pay. As the dissent correctly observed, "Customs' defective notices have prejudiced Intercargo," and "Section 1504 was passed . . . to 'increase certainty in the process for . . . surety companies . . . with a potential liability relating to a customs transaction.'" A16. If the ability to challenge the reason for an extension is viewed as the only cure to the inherent prejudice resulting from Customs' failure to state a statutory reason for an extension, then the requirement of providing notice in a proper form and manner is totally negated. *See Griffin v. Harris*, 571 F.2d 767, 772 (3d Cir. 1978) (the "intended beneficiaries of the statute" are entitled to its benefits as "a matter of statutory entitlement").

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that a writ of certiorari issue to review the judgment and decision of the Court of Appeals for the Federal Circuit.

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Dated: October 22, 1996

United States Court of Appeals for the Federal Circuit

95-1344

INTERCARGO INSURANCE COMPANY
f/k/a INTERNATIONAL CARGO
& SURETY CO., (SURETY FOR M. GENAUER),

Plaintiff-Appellee

v.

THE UNITED STATES,

Defendant-Appellant.

DECIDED: May 2, 1996

Before RADER, Circuit Judge, COWEN, Senior Circuit Judge, and BRYSON, Circuit Judge.

Opinion for the court filed by Circuit Judge BRYSON. Dissenting opinion filed by Circuit Judge RADER.

BRYSON, Ciruit Judge.

This dispute over import duties turns on whether the Customs Service obtained a valid extension of time within which to liquidate an importer's entries. The Court of International Trade held that Customs' extension notices were defective, and that the importer's surety was therefore entitled to judgment with respect to the disputed duties that Customs sought to impose. Intercargo Ins. Co. v. United States, 879

F. Supp. 1338. We reverse and remand for further proceedings.

I

M. Genauer was the importer of a series of shipments of merchandise that entered this country at the Port of Seattle, Washington, between September and November of 1989. Appellee Intercargo Insurance Company served as Genauer's surety in connection with those imports. Upon the arrival of Genauer's merchandise, the Customs Service began its standard procedure for liquidating the entries, i.e., determining the duty to be assessed on the imported items. As part of the liquidation process, Customs sought information relating to the entries.

Under 19 U.S.C. § 1504(a), Customs is required to complete its liquidation of entries within one year unless it extends that period as provided in 19 U.S.C. § 1504(b). The liquidation period cannot be extended for a total of more than four years from the date of entry (or other statutory triggering date). 19 U.S.C. § 1504(d). If Customs fails to complete the liquidation within the statutory period, including any extensions, the entries "shall be deemed liquidated at the rate of duty, value, quantity and amount of duties asserted at the time of entry." 19 U.S.C. § 1504(a).

In July of 1990, Customs had not completed its liquidation of the entries at issue in this appeal. Therefore, in order to avoid liquidation by operation of law under section 1504(a), Customs extended the liquidation period for one year pursuant to section 1504(b). At the time, section 1504(b) provided:

> The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer of record in such form and manner as the Secretary shall prescribe in regulations, if--
>
> (1) information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer;
>
> (2) liquidation is suspended as required by statute or court order; or
>
> (3) the importer of record requests such an extension and shows good cause therefore.

19 U.S.C. § 1504(b)(1988). The statute has subsequently been amended, but the amendment does not affect the outcome of this case.

Under section 1504(b), Customs can extend the liquidation period unilaterally, simply by giving notice in the form and manner prescribed by regulation. The pertinent regulation provides that the district director of the Customs Service can extend the one-year period if "information needed by Customs for the proper appraisement or classification of the merchandise is not available." 19 C.F.R. § 159.12(a)(1). The regulation further provides that if the district director extends the time for liquidation, "he promptly shall notify [the importer and its surety], on Customs Form 4333-A, appropriately modified, that the time has been extended and the reasons for doing so." 19 C.F.R. § 159.12(b).

Invoking section 1504(b), Customs sought to extend the time by one year for liquidating each of the entries. As part of the extension process, Customs advised Intercargo that the liquidation period had been extended. The notice that Customs sent to Intercargo with respect to each entry read as follows:

> THIS IS A COURTESY NOTICE. THE LIQUIDATION OF THIS ENTRY HAS BEEN EXTENDED; ADDITIONAL TIME IS REQUIRED BY CUSTOMS TO PROCESS THIS TRANSACTION. NO ACTION IS NECESSARY ON YOUR PART UNLESS INFORMATION IS SPECIFICALLY REQUESTED BY CUSTOMS.

A year later, in July of 1991, Customs liquidated the entries at a higher duty than that claimed by Genauer upon entry. Intercargo, as Genauer's surety, paid the liquidated duties for the entries and protested Customs' decision, but its protest was denied.

In December of 1992, Intercargo filed suit in the Court of International Trade challenging the assessed duties. Intercargo claimed that the liquidation extensions were invalid and that the entries therefore should be deemed liquidated by operation of law, which would result in a reduction of the duties to the rates claimed by the importer at the time of entry.

The Court of International Trade agreed that the one-year extensions for liquidating Genauer's entries were invalid. In the court's view, the extension notices were not effective to

extend the statutory liquidation period unless they recited one of the three statutory reasons for obtaining additional time for the liquidations. The reason given in the extension notices at issue in this case -- that "additional time is required by Customs to process this transaction" -- was not one of the listed statutory reasons for an extension. Accordingly, the court held that the extension notices did not extend the time to complete the liquidations; the court therefore granted summary judgment to Intercargo on its challenge to the assessed duties.

II

A

Our analysis begins with this court's decision in St. Paul Fire & Marine Ins. Co. v. United States, 6 F.3d 763 (Fed. Cir. 1993). The St. Paul court held that under section 1504 the Customs Service had one year within which to liquidate entries unless "properly noticed extensions" were granted "for statutory reasons." 6 F.3d at 770. The applicable regulation, according to the court, required "that Customs notify the importer of the extension and articulate[] one of three statutory reasons for the extension." 6 F.3d at 767. If notice of an extension was given in the proper manner, the court held, the decision to extend the liquidation period would be upheld unless the importer or the surety "eliminated all reasonable bases for making that decision." Id. at 768.

Intercargo's argument in this case is based on St. Paul and is straightforward. The argument proceeds as follows: (1) St. Paul requires that Customs' extension notices articulate one of the three statutory reasons for the extensions; (2) the only applicable statutory ground for obtaining extensions in

this case is that "information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer"; (3) the notices in this case did not articulate that statutory ground, but merely stated that Customs needed "additional time" to process the transaction; therefore (4) the extension notices were invalid; and (5) each entry was liquidated by operation of law one year after the date of entry of that merchandise, at the duty rate claimed by Genauer at the time of entry.

The government argues at length that the extension notices were legally sufficient to satisfy the requirement in the Customs regulation that Customs notify the importer and surety "that the time has been extended and the reasons for doing so." While it is true that the notices advised Intercargo that the time had been extended and gave a reason for the extensions, the reason given was not one of the statutorily authorized reasons. The statutory reason that Customs intended to invoke was that "information needed for the appraisement or classification of the merchandise is not available to the appropriate customs officer." 19 U.S.C. § 1504(b)(1) (1988). The notices, however, made no reference to the need for information. We thus agree with Intercargo that the reason given in the extension notices was not one of the reasons set forth in the statute, and that the notices therefore did not satisfy the requirement of the regulation as interpreted by the St. Paul court.

That conclusion, however, does not decide this case. There remains the question of what consequence should flow from the defect in the notices, to which we now turn.

B

It is well settled that principles of harmless error apply to the review of agency proceedings. The harmless error rule is incorporated in the judicial review section of the Administrative Procedure Act, which governs the review of the Customs Service's decision in this case. Thus, Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706, provides that in applying the rules governing the review of agency action, "due account shall be taken of the rule of prejudicial error." That statute requires courts to apply conventional principles of harmless error when reviewing agency action. See Kolek v. Engen, 869 F.2d 1281, 1286 (9th Cir. 1989); Braniff Airways, Inc. v. CAB, 126 U.S. App. D.C. 399, 379 F.2d 453, 465-66 (D.C. Cir. 1967); Kerner v. Celebrezze, 340 F.2d 736, 740 (2d Cir.), cert. denied, 382 U.S. 861, 86 S. Ct. 121, 15 L. Ed. 2d 99 (1965). As the Supreme Court explained in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558, 55 L. Ed. 2d 460, 98 S. Ct. 1197 (1978), administrative action, like court decisions, should be set aside "only for substantial procedural or substantive reasons." See Sea-Land Serv., Inc. v. United States, 14 C.I.T. 253, 735 F. Supp. 1059, 1063 (Ct. Int'l Trade 1990) (it is "well settled that courts will not set aside agency action for procedural errors unless the errors 'were prejudicial to the party seeking to have the action declared invalid'"), aff'd and adopted, 923 F.2d 838 (Fed. Cir. 1991).

1

The first question presented by the harmless error inquiry is whether the error at issue in this case is of the sort that is amenable to harmless error analysis. Intercargo argues that it is not, inasmuch as the statute and the regulation dictate that

the consequence of a defect in the extension notice is that the extension is not obtained. In essence, Intercargo's argument is that a notification reciting a statutory reason for the extension is a condition precedent to an extension of the one-year liquidation period, and that if that condition is not met, the extension never takes effect.

At the outset, we note that neither the statute nor the regulation dictates that the necessary consequence of a defect in the extension notice is to render the extension void. The statute requires Customs to inform the importer of the extension in the form and manner dictated by regulation, and the pertinent regulation provides that "if the district director extends the time for liquidation," he "promptly shall notify the importer and surety" of the fact of and reason for the extension. Neither speaks to the consequence of a defect in the notice.

With respect to Intercargo's contention that strict compliance with the statute and regulation is required because it is the notice that effects the extension, the courts have rejected the same argument in the analogous context of notices of appeal. Rule 3 of the Federal Rules of Appellate Procedure directs that a notice of appeal must contain particular matters. Nonetheless, while it is the filing of the notice of appeal that confers jurisdiction on the appellate court (just as it is the service of the notice of extension that extends the liquidation period under the Customs laws), strict adherence to the requirements of Rule 3 is not a prerequisite to a valid appeal, as long as the litigant's action is "the functional equivalent of what the rule requires." Smith v. Barry, 502 U.S. 244, 248, 116 L. Ed. 2d 678, 112 S. Ct. 678

(1992); see also Torres v. Oakland Scavenger Co., 487 U.S. 312, 315-16, 101 L. Ed. 2d 285, 108 S. Ct. 2405 (1988) ("imperfect but substantial compliance" with technical requirements is sufficient). When the defect in the notice of appeal "did not mislead or prejudice" the appellee, and when the appellant's intention to appeal the order in question "was manifest," the Supreme Court has held that the "ineptness" of the notice should not defeat the appellant's right to appeal. Foman v. Davis, 371 U.S. 178, 181, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962) ("It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities."). As a leading commentator has observed, summarizing a vast body of decisional law on the subject, "Defects in the wording of the notice of appeal are generally overlooked if the true intentions of the appellant can fairly be ascertained, if the courts have not been misled, and if the other parties have suffered no prejudice." 16 Charles Alan Wright et al., Federal Practice & Procedure § 3949, at 469 (1995 Supp.). As in the case of defects in notices of appeal, we conclude that the "rule of prejudicial error" applies to the defect at issue in this case.

Moreover, Intercargo's "strict compliance" argument sweeps too broadly. The regulation governing liquidation extensions provides, for example, that the district director shall notify the surety of an extension "on Customs Form 4333-A." 19 C.F.R. § 159.12(b). We assume Intercargo would not argue that the extension would be invalid if notice were given on a Customs form having a different number, and if such an argument were made we would have no difficulty rejecting it. We think the same result would follow if the

regulation required that the notice be sent by registered mail, but in a particular instance it was sent by certified mail instead. Therefore, it is not the case, as Intercargo contends, that any extension notice that does not strictly conform to the "form and manner" prescribed in the regulation is ineffective to extend the liquidation period. Some deviations from the terms that are, or could be, included in the regulation would plainly be insufficient to render the extension ineffective. That is because not all deviations from the requirements of the statute or regulation would affect the interests that the statute and regulation are designed to protect, and because of the general principle that public rights should not be prejudiced because of immaterial errors on the part of public servants.

On this point, the Supreme Court's opinion in Brock v. Pierce County, 476 U.S. 253, 90 L. Ed. 2d 248, 106 S. Ct. 1834 (1986), is instructive. The Court in that case held that an agency's failure to satisfy a statutory timing requirement did not deprive the agency of its authority to act. The Court explained that it "would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake." Id. at 260.

Subsequently, in United States v. James Daniel Good Real Property, 126 L. Ed. 2d 490, 114 S. Ct. 492 (1993), the Supreme Court considered the effect of various statutory requirements governing the timing of forfeiture actions brought by Customs officers. The Court declined the invitation to hold that a violation of those timing requirements compelled it to dismiss the underlying forfeiture action. As the Court explained,

> We have held that if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction. . . . "[There] is no presumption or general rule that for every duty imposed upon the court or the Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions, even if negligent."

114 S. Ct. at 506 (citations omitted).

This court recently applied the Supreme Court's analysis from Pierce County and James Daniel Good in a manner that provides useful guidance here. In Kemira Fibres Oy v. United States, 61 F.3d 866 (Fed. Cir. 1995), the Department of Commerce failed to publish a notice of its intention to revoke a particular finding that had been made under the antidumping laws. Commerce's error violated its own regulations, and the question presented in the case was whether Commerce's failure to comply with the regulatory notice requirement voided the agency's subsequent administrative action. The court held that the administrative default by Commerce did not compel the court to revoke the antidumping finding. As the court explained, the plaintiff "should not become immune from the antidumping laws because Commerce missed the deadline. The national interest in the regulation of importation should not fall victim to an oversight by Commerce." Id. at 873.

The same principle applies here. The public interest in the administration of the importation laws should not "fall victim"

to the failure by the Customs Service to use the requisite language in its extension notices, if the oversight has not had any prejudicial impact on the plaintiff.

2

That brings us to the second question arising under the harmless error analysis in this case: whether the defect in the extension notices was prejudicial to Intercargo. On this point, we think it clear that Intercargo suffered no prejudice.

Intercargo was informed that Customs was extending the liquidation period by one year. The purpose of the notice -- to increase certainty in the customs process by apprising the importer and its surety of the precise period within which final action would be taken on the liquidation -- was therefore satisfied. See S. Rep. No. 778, 95th Cong., 2d Sess. 32 (1978). Moreover, if Intercargo believed that Customs did not have a valid statutory reason for the extensions, it was open to Intercargo to seek to have the extensions invalidated on that ground. See St. Paul, 6 F.3d at 768-70. The omission of the requisite language from the extension notices had no effect on Intercargo's right to challenge the extensions on the ground that Customs did not in fact need additional information from Genauer in order to complete the liquidation. We are thus unable to discern any prejudice Intercargo may have suffered as a result of the defect in the extension notices that would justify forfeiture of the public's rights against the importer or its surety.

Intercargo does not make a serious effort to demonstrate prejudice of the pertinent kind. It asserts in passing that the prejudice it faces is that it may be forced, at the end of this

litigation, to pay additional duties. As Intercargo puts it, "the prejudice flowing from this circumstance is the ultimate prejudice -- the wrongful imposition of customs duty." But that is not what is meant by prejudice as used in this context. A party is not "prejudiced" by a technical defect simply because that party will lose its case if the defect is disregarded. Prejudice, as used in this setting, means injury to an interest that the statute, regulation, or rule in question was designed to protect. See, e.g., Hernandez-Luis v. INS, 869 F.2d 496, 498 (9th Cir. 1989); State of Texas v. Lyng, 868 F.2d 795, 799-800 (5th Cir. 1989); United States v. Cerda-Pena, 799 F.2d 1374, 1377 (9th Cir. 1986); Aero Mayflower Transit, Inc. v. ICC, 228 U.S. App. D.C. 438, 711 F.2d 224, 232 (D.C. Cir. 1983); see generally Diaz v. Department of the Air Force, 63 F.3d 1107, 1109 (Fed. Cir. 1995).

Intercargo was advised of the extensions, and it was not deprived of its opportunity to challenge the extensions in court on the ground that they were not obtained for a statutorily valid reason. There is therefore no apparent prejudice to Intercargo of the type that would be required to justify terminating the government's right to assess import duties that may properly be due. For that reason, the Court of International Trade should not have held that Intercargo is entitled to relief simply because of the defect in the language of the extension notices.

III

In addition to appealing from the decision that the extensions were invalid because of the defect in the extension notices, the government argues that, in the proceedings before

the Court of International Trade, Intercargo waived its right to contest whether the extensions were in fact obtained for a valid reason. The question whether Intercargo waived that claim is an issue that is properly left for the Court of International Trade to determine on remand; we do not reach it. If the Court of International Trade concludes that Intercargo has not waived that issue and Intercargo continues to press it, the court should address the merits of that issue on remand. We hold only that the court's summary judgment order in Intercargo's favor, based solely on the defect in the extension notices, must be overturned.

REVERSED AND REMANDED.

United States Court of Appeals for the Federal Circuit

95-1344

INTERCARGO INSURANCE COMPANY
f/k/a INTERNATIONAL CARGO
& SURETY CO., (SURETY FOR M. GENAUER),

Plaintiff-Appellee

v.

THE UNITED STATES,

Defendant-Appellant.

RADER, Circuit Judge, dissenting.

This court's decision in St. Paul Fire & Marine Ins. Co. v. United States, 6 F.3d 763 (Fed. Cir. 1993), governs this dispute over whether the United States Customs Service (Customs) obtained a valid extension of time for liquidation of Intercargo's entries.

In St. Paul, this court held that section 1504 gives Customs one year to liquidate entries unless "properly noticed extensions" were granted "for statutory reasons." Id. at 770. This court stated that Customs must "notify the importer of the extension and articulate[] one of three statutory reasons for the extension." Id. at 767. In this case, as this court notes, Customs did not give proper notice.

Customs' notices to Intercargo did not give a statutory reason for the extension. The statutory reason that Customs intended to invoke was that "information needed for the

appraisement or classification of the merchandise is not available to the appropriate customs officer." 19 U.S.C. § 1504 (b)(1)(1988). Customs, however, did not mention the need for information in its notices. Thus, these notices did not satisfy the requirement of the regulation. St. Paul, 6 F.3d at 767.

This court, however, treats Customs' defective notices as harmless error. This court inaccurately analogizes Customs' defective notices to procedural errors in notices of appeal. In a defective notice of appeal, the opposing party is not prejudiced by the defect. Any procedural defect can be easily cured without harm to the opposing party. In this case, however, Customs' defective notices have prejudiced Intercargo. Intercargo was prejudiced by the delays that section 1504 was enacted to correct. Section 1504 was passed, in part, to "increase certainty in the process for importers, surety companies and other third parties with a potential liability relating to a customs transaction." S. Rep. No. 778, 95th Cong., 2d Sess. 32 (1978), reprinted in 1978 U.S.C.C.A.N. 2211, 2243. Under the prior law, importers learned years after goods had been imported and sold that additional dues were due, or an excess of duties had been paid pending liquidation. Id. The 1978 enactment changed the law to address these lengthy and prejudicial delays to importers.

Thus, the Customs' extension notices were improper because they did not give a statutory reason for the extension. These notices did not satisfy the requirement of the regulation as interpreted in St. Paul. I would thus affirm the Court of International Trade's holding that the Customs' extension notices were defective.

United States Court of Appeals for the Federal Circuit

95-1344

Intercargo Insurance Company
f/k/a International Cargo
& Surety Co., (Surety for M. Genauer),

Plaintiff-Appellee

v.

The United States,

Defendant-Appellant.

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLEE, and a response thereto having been invited by the court and filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on August 1, 1996.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: July 25, 1996

By: _____
Brian P. LeDuc
Associate Chief Deputy clerk

cc: AMY M. RUBIN
WAYNE JARVIS

INTERCARGO INSURANCE V US, 95-1344
(CIT - 92-09-00595)

United States Court of Appeals for the Federal Circuit

95-1344

INTERCARGO INSURANCE COMPANY
f/k/a INTERNATIONAL CARGO
& SURETY CO., (SURETY FOR M. GENAUER),

Plaintiff-Appellee,

v.

THE UNITED STATES

Defendant-Appellant.

JUDGMENT

Appeal from a decision of the United States Court of International Trade in 92-09-00595 entered March 9, 1995, Judge R. Kenton Musgrave.

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

REVERSED and REMANDED

ENTERED BY ORDER OF THE COURT

DATED: May 02, 1996 Francis X. Gindhart, Clerk

COSTS: Against, Appellee.
PRINTING---------- $752.40
TOTAL---------- $752.40
ISSUED AS A MANDATE: August 1, 1996

UNITED STATES COURT OF INTERNATIONAL TRADE

Intercargo Insurance Co., f/k/a International Cargo & Surety Co., (Surety for M. Genauer	:	
Plaintiff,	:	**Before: Musgrave, Judge**
	:	Court No. 92-09-00595
v.	:	
United States,	:	
Defendant.	:	

[Plaintiff, Intercargo sues defendant, United States for recovery of duties paid after Customs extended the liquidation period. Plaintiff challenges Notice of Extension by Customs as invalid. ***HELD***: Plaintiff's motion for summary judgment is granted, defendant's motion for summary judgment is denied, based on CAFC interpretation of 19 U.S.C. § 1504 as set forth in *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763 (Fed. Cir. 1993).]

Hodes & Pilon (Wayne Jarvis, Michael G. Hodes), for plaintiff.

Frank W. Hunger, Assistant Attorney General; Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United

States Department of Justice, (Carla Garcia-Benitez) for defendant.

OPINION

This matter came before the Court on cross-motions for summary judgment. The parties stipulated to the following: From September through November of 1989, importer M. Genauer entered through the Port of Seattle, Washington, the eight separate entries of merchandise which are the subject matter of this litigation. In mid-July of 1990, Intercargo, surety for Genauer, received individual notices of extension of liquidation of the eight entries. Each of the notices contained the following language:

> THIS IS A COURTESY NOTICE.
> THE LIQUIDATION OF THIS ENTRY HAS BEEN EXTENDED: ADDITIONAL TIME IS REQUIRED BY CUSTOMS TO PROCESS THIS TRANSACTION. NO ACTION IS NECESSARY ON YOUR PART UNLESS INFORMATION IS SPECIFICALLY REQUESTED BY CUSTOMS.

On July 12, 1991, after the statutory one-year period for liquidation had passed, Customs liquidated the entries at a higher duty than that claimed by the importer upon entry. Intercargo paid the liquidated duties for the entries involved and protested to Customs that the notice was not effective as it did not comply with the statute and regulations governing extensions of the liquidation period. Therefore, argued Intercargo, the duty claimed by the importer upon entry is the duty at which the entries should have been liquidated by

operation of law. Customs denied the protest and this action ensued.

The statute governing notices of extension, 19 U.S.C. § 1504, as it existed at the time of the entries set out as follows:

§ 1504. Limitation on liquidation

(a) Liquidation

Except as provided in subsection (b) of this section, an entry of merchandise not liquidated within one year from:

(1) the date of entry of such merchandise;

(2) the date of the final withdrawal of all such merchandise covered by a warehouse entry; or

(3) the date of withdrawal from warehouse of such merchandise for consumption where, pursuant to regulations issued under section 1505(a) of this title, duties may be deposited after the filing of an entry or withdrawal from warehouse;

shall be deemed liquidated at the rate of duty, value, quantity and amount of duties asserted at the time of entry by the importer of record. Notwithstanding section 1500(e) of this title, notice of liquidation need not be given of an entry deemed liquidated.

(b) Extension

The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer of record in such form and manner as the Secretary shall prescribe in regulations, if -

(1) information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer;

(2) liquidation is suspended as required by statute or court order; or

(3) the importer of record requests such extension and shows good cause therefor.

19 U.S.C. § 1504 (1988), *amended by* Act of Dec. 8, 1993, Pub. L. 103-182, title VI, § 641, 107 Stat. 2204 (current version at 19 U.S.C. § 1504 (Supp. V 1993)).

The appropriate Customs Regulation as it existed at the time of the alleged extension is set out as follows:

§ 159.12 Extension of time for liquidation.

(a) *Reasons* -- (1) *Extension.* The district director may extend the 1-year statutory period for liquidation for an additional period not to exceed 1 year if:

(i) *Information needed by Customs.* Information needed by Customs for the proper appraisement or classification of the merchandise is not available, or

* * *

(b) *Notice of extension.* If the district director extends the time for liquidation, as provided in paragraph (a)(1) of this section, he promptly shall notify the importer or the consignee and his agent and surety on Customs Form 4333-A, appropriately modified, that the time has been extended and the reasons for doing so.

19 C.F.R. § 159.12 (1990).

Customs argued, in its memoranda and at oral argument, that (1) the liquidation of the entries was validly extended because the notice of extension of the liquidation complied with the applicable statute, and the pertinent Customs regulation; (2) to the extent that the Customs regulation is deemed to specifically require that the statutory reason for the extension be stated in the notice, the regulation is merely directory - Customs regulations may not alter the statutory requirements for effecting a valid extension; (3) alternatively, any irregularity in the notices of extension of liquidation here is a mere procedural matter which caused no material prejudice to Intercargo, and the validity of the notices should be sustained. Hence, the entries were not liquidated by operation of law on the one year anniversary dates.

For its part Intercargo argued that (1) Customs did not validly extend the liquidation because each notice of extension failed to state a statutory reason specified in 19. U.S.C. § 1504(b); (2) even if Customs can establish that a proper statutory reason for extending the liquidation exists, the failure to state this reason on the notices invalidated the extension; (3) the government is not entitled to summary judgment because it failed to establish a proper statutory basis for extending liquidation; (4) the government failed to demonstrate that the notices of extension were lawful; and (5) that the requirement to provide notice is not "merely directory," as claimed by the government, or "procedural," but did cause a material prejudice to Intercargo.

Thus, the issue that came before this Court was whether the notice issued to Intercargo complied with 19 U.S.C. § 1504 and 19 C.F.R. § 159.12, and validly extended the liquidation period when the notice did not explicitly contain one of the three statutory reasons set forth in 19 U.S.C. § 1504(b). The Court of Appeals for the Federal Circuit ("CAFC"), has spoken clearly on the subject of notices of extension in *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763 (Fed. Cir. 1993). In that case, the CAFC interpreted 19 U.S.C. 1504 *de novo* in reviewing a Court of International Trade decision that Customs had not lawfully extended the liquidation period for contested entries. The CAFC ruled that "the time period may be extended . . . provided that Customs notifies the importer of the extension and articulates one of the three statutory reasons for the extension. 19 U.S.C. § 1504(b), (c)." *Id.*, 6 F.3d at 767.

This Court found that the reason given to Intercargo in the present case, that "ADDITIONAL TIME IS REQUIRED . . .," was not a clearly articulated statutory reason for extending liquidation. This Court therefore held the extension not to be valid under the law. Accordingly, plaintiff's motion for summary judgment was granted, and defendant's motion for summary judgment was denied.

R. KENTON MUSGRAVE, JUDGE

Dated: New York, New York
March 9, 1995

UNITED STATES COURT OF INTERNATIONAL TRADE

Intercargo Insurance Co., f/k/a International Cargo & Surety Co., (Surety for M. Genauer	:	
Plaintiff,	:	**Before: Musgrave, Judge**
	:	Court No. 92-09-00595
v.	:	
United States,	:	
Defendant.	:	

JUDGMENT

This cause coming on to be heard on the cross-motions for summary judgment of plaintiff, Intercargo Insurance Company and defendant, The United States, and upon respective opposition and replies, and the Court, having heard the arguments of counsel and being otherwise fully advised in the premises, now therefore,

It is hereby **ORDERED** that:

(1) Plaintiff's motion be and the same is hereby granted;

(2) Defendant's motion be and the same is hereby denied;

(3) The Notices of Extension of liquidation in this case were and are invalid, and are hereby set aside, and that the

July 12, 1991 liquidation of the subject entries were and are null and void;

(4) The subject entries were and are deemed liquidated at the duty, value, quantity, and amount of duties asserted at the time of entry by the importer;

(5) A monetary judgment shall be and is hereby entered in favor of plaintiff and against defendant pursuant to 28 U.S.C. § 2643(a), in an amount equal to the duties Plaintiff paid on the subject entries, together with interest thereon pursuant to 28 U.S.C. § 2644, calculated from August 31, 1992;

(6) Defendant shall satisfy the foregoing judgment within sixty (60) days following the entry of this Order.

WHEREAS plaintiff's first cause of action has been abandoned as set forth in this Court's order of February 7, 194, there being no further matters before this Court, this case is accordingly dismissed.

R. KENTON MUSGRAVE, JUDGE

Dated: New York, New York
March 9, 1995

19 U.S.C. Section 1504 (1988):

§ 1504. Limitation on liquidation

(a) Liquidation

Except as provided in subsection (b) of this section, an entry of merchandise not liquidated within one year from:

(1) the date of entry of such merchandise;

(2) the date of the final withdrawal of all such merchandise covered by a warehouse entry; or

(3) the date of withdrawal from warehouse of such merchandise for consumption where, pursuant to regulations issued under section 1505(a) of this title, duties may be deposited after the filing of an entry or withdrawal from warehouse;

shall be deemed liquidated at the rate of duty, value, quantity and amount of duties asserted at the time of entry by the importer of record. Notwithstanding section 1500(e) of this title, notice of liquidation need not be given of an entry deemed liquidated.

(b) Extension

The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to

the importer of record in such form and manner as the Secretary shall prescribe in regulations, if -

(1) information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer;

(2) liquidation is suspended as required by statute or court order; or

(3) the importer of record requests such extension and shows good cause therefor.

(c) Notice of suspension. If the liquidation of any entry is suspended, the Secretary shall, by regulation, require that notice of such suspension be provided to the importer of record concerned and to any authorized agent and surety of such importer of record.

(d) Limitation. Any entry of merchandise not liquidated at the expiration of four years from the applicable date specified in subsection (a) of this section, shall be deemed liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record, unless liquidation continues to be suspended as required by statute or court order. When such a suspension of liquidation is removed, the entry shall be liquidated within 90 days therefrom.

19 U.S.C. § 1504 (1988), *amended by* Act of Dec. 8, 1993, Pub. L. No. 103-182, Title VI, § 641, 107 Stat. 2204; and Act of Dec 8, 1994, Pub. L. No. 103-465, Title II, § 220(c), 108 Stat. 4865.

19 C.F.R. Section 159.12 (1990):

§ 159.12 Extension of time for liquidation.

(a) *Reasons* -- (1) *Extension.* The district director may extend the 1-year statutory period for liquidation for an additional period not to exceed 1 year if:

(i) *Information needed by Customs.* Information needed by Customs for the proper appraisement or classification of the merchandise is not available, or

(ii) *Importer's request.* The importer requests an extension in writing before the statutory period expires and shows good cause why the extension should be granted. "Good cause" is demonstrated when the importer satisfies the district director that more time is needed to present to Customs information which will affect the pending action, or there is a similar question under review by Customs.

(2) *Suspension.* The 1-year liquidation period may be suspended as required by statute or court order.

(b) *Notice of extension.* If the district director extends the time for liquidation, as provided in paragraph (a)(1) of this section, he promptly shall notify the importer or the consignee and his

agent and surety on Customs Form 4333-A, appropriately modified, that the time has been extended and the reasons for doing so.

(c) *Notice of suspension.* If the liquidation of an entry is suspended as required by statute or court order, as provided in paragraph (a)(2) of this section, the district director promptly shall notify the importer or the consignee and his agent and surety on Customs Form 4333-A, appropriately modified, of the suspension.

(d) *Additional extensions* -- (1) *Information needed by Customs.* If an extension has been granted because Customs needs more information and the district director thereafter determines that more time is needed, he may extend the time for liquidation for an additional period not to exceed 1 year provided he issues the notice required by paragraph (b) of this section before termination of the prior extension period.

(2) *At importer's request.* If the statutory period has been extended for 1 year at the importer's request, and the importer thereafter determines that additional time is necessary, he may request another extension in writing before the original extension expires, giving reasons for his request. If the district director finds that good cause (as defined in paragraph (a)(1)(ii) of this section) exists, he shall issue a notice extending the time for liquidation for an additional period not to exceed 1 year.

(e) *Limitation on extensions.* The total time for which extensions may be granted by the district director may not exceed 3 years.

(f) *Time limitation* -- (1) *Generally.* An entry not liquidated within 4 years from either the date of entry, or the date of final withdrawal of all the merchandise covered by a warehouse entry, shall be deemed liquidated by operation of law at the rate of duty, value, quantity, and amount of duty asserted by the importer at the time of filing the entry summary for consumption in proper form, with estimated duties attached, or the withdrawal for consumption in proper form, with estimated duties attached, unless liquidation continues to be suspended by statute or court order. Customs will endeavor to provide a courtesy notice of liquidation on Customs Form 4333-A, in accordance with § 159.9(d), in addition to the bulletin notice specified in § 159.9(c)(2)(ii).

(2) *Suspension of liquidation by statute or court order.* When liquidation of an entry continues to be suspended beyond the 4-year period specified in paragraph (f)(1) of this section due to a statute or court order, the entry shall be liquidated within 90 days after removal of the suspension.

(g) *Notice of liquidation.* If an entry is liquidated after an extension expires or a suspension is removed, notice of liquidation shall be given on the bulletin notice of liquidation, Customs Form 4333, as provided in §§ 159.9 and 159.10(c)(3). Customs will endeavor to provide a courtesy notice of liquidation on Customs Form 4333-A in accordance with § 159.9(d).

19 C.F.R. § 159.12 (1990).

(2)

Supreme Court, U.S.
FILED
DEC 23 1996
CLERK

No. 96-650

In the Supreme Court of the United States

OCTOBER TERM, 1996

INTERCARGO INSURANCE COMPANY FKA INTERNATIONAL CARGO & SURETY CO., ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DAVID M. COHEN
JOSEPH I. LIEBMAN
AMY M. RUBIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Under 19 U.S.C. 1504, the United States Customs Service is required to complete its final computation of duties on imported goods within one year, unless it extends that period as provided in 19 U.S.C. 1504(b), including notice to the importer. The question presented in this case is whether the Customs Service was barred from extending the one-year period because the notice it provided to the importer did not recite one of the statutory reasons for the extension set forth in Section 1504(b).

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-650

INTERCARGO INSURANCE COMPANY FKA
INTERNATIONAL CARGO & SURETY CO., ETC.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 83 F.3d 391. The opinion of the Court of International Trade (Pet. App. A20-A26) is reported at 879 F. Supp. 1338.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1996. A petition for rehearing was denied on July 25, 1996. Pet. App. A17-A18. The petition for a writ of certiorari was filed on October 22, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under 19 U.S.C. 1504(a)(1), the United States Customs Service is required to complete its assessment of import duties on imported goods (liquidation of entries) within one year from the date of entry of the merchandise.[1] The statute provides that, if the liquidation is not completed during that one-year period, the merchandise "shall be deemed liquidated at the rate of duty * * * asserted at the time of entry by the importer of record." 19 U.S.C. 1504(a).

The Customs Service may, however, extend the liquidation period if, among other reasons, "the information needed for the proper appraisement or classification of the merchandise, or for insuring compliance with applicable law, is not available to the Customs Service." 19 U.S.C. 1504(b)(1); see also 19 C.F.R. 159.12(a)(1).[2] If a District Director of the Customs Service wishes to extend the liquidation period for merchandise, "he promptly shall notify [the importer of record and its surety] on Customs Form 4333-A,

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[1] "*Liquidation* means the final computation or ascertainment of the duties or drawback accruing on an entry." 19 C.F.R. 159.1.

[2] The version of Section 1504(b) in effect at the time of entry provided, in pertinent part:

> The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer of record in such form and manner as the Secretary shall prescribe in regulations, if—
>
> (1) information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer.

19 U.S.C. 1504(b) (1988). The statute was amended to its current form by Pub. L. No. 103-182, § 641, 107 Stat. 2204 (1993).

appropriately modified, that the time has been extended and the reasons for doing so." 19 C.F.R. 159.12(b).[3]

An importer, surety, or other authorized person who wishes to dispute the liquidated amount of duties may file an administrative protest. 19 U.S.C. 1514. If, after the protest, the party is still dissatisfied, it may seek judicial review of the duty in the Court of International Trade. 28 U.S.C. 1581(a).

2. Petitioner is the surety that posted bonds for M. Genauer, the importer of record, in connection with the eight entries of merchandise covered by this action. All the entries occurred in 1989. In July 1990, both Genauer and petitioner received notices from the Customs Service indicating that the time to liquidate the entries was being extended for one year. Each of the notices stated:

> THIS IS A COURTESY NOTICE. THE LIQUIDATION OF THIS ENTRY HAS BEEN EXTENDED; ADDITIONAL TIME IS REQUIRED BY CUSTOMS TO PROCESS THIS TRANSACTION. NO ACTION IS NECESSARY ON YOUR PART UNLESS INFORMATION IS SPECIFICALLY REQUESTED BY CUSTOMS.

Pet. App. A4. In July 1991, the Customs Service liquidated the entries at a higher duty than that claimed by Genauer upon entry. Petitioner paid the liquidated duties under protest. *Ibid.*

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[3] The period for liquidation may be extended in one-year intervals, for a period not to exceed a total of four years. 19 C.F.R. 159.12(a), (c) and (d).

3. Petitioner filed this action in the Court of International Trade to recover the duties assessed and paid after the Customs Service extended the liquidation period. Petitioner contended that Customs' extensions were invalid because the notices sent to it and Genauer failed to recite the specific statutory reason invoked for extending the liquidation period. Petitioner therefore contended that, under Section 1504(a), the entries should be deemed liquidated at the rate of duty asserted at the time of entry.

The Court of International Trade agreed and granted summary judgment to petitioner. Pet. App. A20-A28. The court relied on the decision of the Court of Appeals for the Federal Circuit in *St. Paul Fire & Marine Insurance Co.* v. *United States*, 6 F.3d 763 (1993), which it read to hold that the liquidation period may be extended only if "Customs notifies the importer of the extension and articulates one of the three statutory reasons for the extension." Pet. App. A25; see 6 F.3d at 767. The court concluded that, because in this case the Customs Service had not specifically notified petitioner that "information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer" (see 19 U.S.C. 1504(b)(1988)), the extension was invalid. Pet. App. A26.

4. A divided panel of the Court of Appeals for the Federal Circuit reversed. Pet. App. A1-A16. The court of appeals initially agreed with the trial court that, because the notices provided by Customs did not recite the statutory reason for extending the liquidation period, those notices did not satisfy the requirement of the relevant Customs Service regulation, 19 C.F.R. 159.12(b), as construed by the *St. Paul* decision. See Pet. App. A6.

The court of appeals also held, however, that the Customs Service's omission was harmless error. Pet. App. A7. The court noted that neither the statute nor the relevant Customs Service regulation dictated that the necessary consequence of a technical defect in the extension notice is to render the extension void. *Id.* at A8. The court observed that, in analogous areas of the law, such as that governing notices of appeal from the district courts to the courts of appeals, "imperfect but substantial compliance" with technical requirements is sufficient. *Id.* at A9. The court of appeals also noted that this Court has held that an agency's failure to satisfy a statutory timing requirement does not deprive the agency of its authority to act, *id.* at A10-A11, since the national interest in the administration of the laws should not "fall victim" to technical errors by administrative agencies, *id.* at A11-A12. The court further concluded that petitioner was not prejudiced by Customs' omission, because petitioner "was not deprived of its opportunity to challenge the extensions in court on the ground that they were not obtained for a statutorily valid reason." *Id.* at A13.

Finally, although petitioner had abandoned a count in its complaint alleging that the extensions were void because there was no proper basis for the extensions (see Pet. 7-8), the court of appeals remanded the case to the Court of International Trade to determine whether petitioner had "waived its right to contest whether the extensions were in fact obtained for a valid reason." Pet. App. A14.[4]

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[4] Judge Rader dissented. Pet. App. A15-A16. He agreed with the majority that the Customs Service's notices were

ARGUMENT

The court of appeals' decision that the technical defect in the Customs Service's notices extending the liquidation period was harmless error is correct. That decision does not conflict with any decision of this Court or any other court of appeals. Moreover, petitioner's argument is based in large part on language in the relevant statute that has since been amended. Accordingly, further review is not warranted.

1. Under 19 U.S.C. 1504(a), an entry that is not liquidated within one year of the date of entry will be deemed liquidated at the rate of duty asserted by the importer at the time of entry, unless the liquidation period is extended as provided in 19 U.S.C. 1504(b). The version of Section 1504(b) applicable to this case[5] provided that Customs could extend the liquidation of entries if one of the specified reasons for extension existed, and the importer of record was notified of the extension. Section 1504(b) does not now and did not then, however, prescribe the form or manner of the notice to be provided to the importer. Nor does the statute itself require that the importer be provided with the specific reason for the extension; that requirement is supplied, rather, by the Customs Service's own regulation, 19 C.F.R. 159.12(b). Further, neither the statute nor the regulation states that the failure of the Customs Service to articulate the specific reason for the extension of the liquidation period renders that extension void.

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invalid, but concluded that petitioner was prejudiced by the omission from the notices. *Id.* at A16.

[5] See note 2, *supra*; see also pp. 10-11, *infra*.

Thus, contrary to petitioner's argument (Pet. 13-15), this is not an area in which Congress has spoken to the precise issue at hand, namely, the consequence of the agency's failure to adhere to a technical aspect of a notice regulation.[6] Accordingly, the court of appeals correctly concluded that general principles of harmless error in judicial review of administrative action should be applied to this case. And, as the court of appeals noted, the courts should be hesitant to conclude that an agency's failure to meet a technical requirement of notice renders subsequent agency action void, especially when important public rights are at stake, and no private party would suffer prejudice by validation of the agency action. See Pet. App. A8-A11; *Brock* v. *Pierce County*, 476 U.S. 253, 260 (1986) (Secretary of Labor did not lose jurisdiction to seek reimbursement of misused CETA funds by failing to issue final determination within statutory time limit of 120 days).

Petitioner maintains that Congress intended to increase certainty in the process of assessing duties, and that it was prejudiced by the agency's omission because the agency subsequently decided to impose a higher duty than the one claimed at the time of entry. Petitioner notes that Congress was concerned that

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[6] For that reason, petitioner's reliance on Section 1504 as a jurisdictional bar or a statute of limitations (Pet. 22-27) is unavailing. Petitioner contends that Section 1504(a) provides that the consequence of the Customs Service's failure to extend the liquidation period is to liquidate the entries at the rate of duty claimed by the importer. Even if that point is correct, however, it does not resolve this case. The issue in this case is the consequence of the Customs Service's failure to specify the reason for the extension of the liquidation period, not the consequence of its failure to extend that period at all.

an importer or its surety might learn, years after the goods had been imported, that they were subject to a higher duty than the one they had expected. Pet. 17.

As the court of appeals pointed out, however, petitioner was made aware in a timely fashion that the liquidation period was being extended, even though the extension notice might not have complied with all technical requirements. "The purpose of the notice—to increase certainty in the customs process by apprising the importer and its surety of the precise period within which final action would be taken on the liquidation—was therefore satisfied." Pet. App. A12. Petitioner was made aware, as required by the statute, that Customs was evaluating its claim about the applicable duty. Thus, petitioner knew that it would not have the benefit, by default, of the provision of Section 1504(a) that sets the duty as that claimed by the importer when Customs does not liquidate an entry within one year and also fails to extend the liquidation period.

Furthermore, if petitioner believed that Customs did not have a valid statutory reason for extending the liquidation period, it could have presented that argument to the courts upon judicial review of the duties that were eventually assessed. Thus, petitioner has not shown that its substantive rights were infringed by the agency's technical error. Cf. *Braniff Airways, Inc.* v. *Civil Aeronautics Bd.*, 379 F.2d 453, 465-466 (D.C. Cir. 1967).[7]

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[7] See *Sagebrush Rebellion, Inc.* v. *Hodel*, 790 F.2d 760 (9th Cir. 1986) (notices of draft environmental impact statements and hearings were valid although they failed to state that the Secretary of the Interior, rather than Congress, might create the subject conservation area); *United States* v. *Priority Prods., Inc.*, 793 F.2d 296 (Fed. Cir. 1986) (administrative pre-

2. Petitioner argues that the decision below conflicts with decisions of other circuits holding that an agency's action in violation of its own regulations is void. Pet. 20-22. With one exception, however, those decisions do not concern the issue presented here, namely, the consequences of an agency's failure to comply with its own technical requirement bearing on the timing of agency action. The one case relied on by petitioner that does address that issue, *Lehigh Valley Manpower Program* v. *Donovan*, 718 F.2d 99 (3d Cir. 1983) (see Pet. 21-22), was subsequently disapproved by this Court in *Brock* v. *Pierce County*, *supra*. See 476 U.S. at 258 n.5.

In *Pierce County*, the Court noted that, although the relevant regulations arguably created a statutory timetable for issuance of a final determination on complaints about misuse of federal funds, they did not "specify any consequences of a failure to meet that deadline[.] * * * Thus, even if it were possible for the Secretary to create a jurisdictional limitation not contained in the statute, the language of the regulations cannot support [the] contention that the 120-day provision is jurisdictional." 476 U.S. at 265. The same analysis applies here. Nothing in the agency's regulation requiring articulation of the specific reason for extension of the liquidation period also specifies that the consequence of a failure to articu-

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penalty and penalty notices naming only corporation did not preclude action to recover penalties against husband and wife who were the sole corporate shareholders); see also *Small Refiner Lead Phase-down Task Force* v. *United States Environmental Protection Agency*, 705 F.2d 506, 549 (D.C. Cir. 1983) ("Our cases recognize that even if the agency has not given notice in the statutorily prescribed fashion, actual notice will render the error harmless.").

late that reason is to render the extension void. Accordingly, *Pierce County* fully supports the court of appeals' conclusion that the Customs Service's failure to meet all the requirements of its own regulation did not deprive it of authority to extend the liquidation period.

3. Finally, we note that petitioner's argument is based in large part on language in the statute that has been amended. As petitioner points out, the version of Section 1504(b) in effect at the time of entry provided that "[t]he Secretary may extend the period in which to liquidate an entry *by giving notice* of such extension to the importer of record." See Pet. 3 (quoting 19 U.S.C. 1504(b) (1988)) (emphasis added). Petitioner argues (Pet. 15) that the Customs Service's notice to the importer is the act of extension itself, and that a failure to give proper notice is also a failure to extend the liquidation period.

The statute, however, no longer states that the liquidation period may be extended "by giving notice." It now provides that "[t]he Secretary may extend the period in which to liquidate an entry" if relevant information is not available, and provides separately that "[t]he Secretary shall give notice of an extension under this subsection to the importer of record and the surety." 19 U.S.C. 1504(b). Accordingly, even if petitioner's contention had merit, it would have no continuing significance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1996